
No. 26-338

IN THE

Shawnee Supreme Court

FALL 2026

**METROPOLITAN HEALTH SYSTEM, INC. AND CYBER-CARE
SOLUTIONS, LLC,**

Petitioners

— *versus* —

**EVELYN MILLER, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR
FOR THE ESTATE OF ELIAS MILLER, DECEASED**

Respondent

On Petition for Leave to Appeal to the

Shawnee Court of Appeals

For the Second District

BRIEF FOR RESPONDENT

TEAM PRECEDENT PRESCRIBERS

Attorneys for Respondent

QUESTIONS PRESENTED

- I. Whether Metropolitan Health System may be held vicariously liable under the doctrine of apparent agency for the diagnostic errors of Cyber MD, an autonomous AI software tool, which was integrated into Metropolitan Health System’s branded telehealth platform.
- II. Whether Respondent’s claims are barred by Shawnee’s four-year statutes of repose and whether the repose periods were tolled because:
 - a. Cyber MD’s annual diagnostic evaluations constituted a “continuous course of treatment” under Shawnee Revised Statute § 12-404; or
 - b. the latent, un-discoverable nature of the algorithmic flaw and subsequent retraining fall within the exception under Shawnee Revised Statute § 12-410.

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OPINIONS BELOW

The unreported opinion of the Shawnee Court of Appeals for the Second District in *Miller v. Metropolitan Health System, Inc.*, No. 25-123 (Feb. 24, 2026) is contained in the Record of Appeal at pages 14-25. The Court of Appeals REVERSED the circuit court's grant of summary judgment and REMANDED the case for further proceedings. The unreported order of the Circuit Court of Simmons County in *Miller v. Metropolitan Health System, Inc.*, Case No. 25-L-24601 (Mar. 6, 2025) is contained in the Record of Appeal at pages 1-12. The circuit court GRANTED the Defendants' motion for summary judgment and DISMISSED the Plaintiff's complaint with prejudice.

STATUTORY PROVISIONS INVOLVED

The statutory provisions relevant to this proceeding are Shawnee Rule of Civil Procedure 56 and Shawnee Revised Statutes §§ 12-402, 12-404, and 12-410.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case involves Evelyn Miller’s (“Respondent”) claims arising from the diagnostic errors of Cyber MD, an artificial intelligence diagnostic system integrated into Metropolitan Health System, Inc.’s (“MHS”) telehealth platform. Respondent brings these claims individually and as Special Administrator of the Estate of Elias Miller, her deceased husband (“Mr. Miller”).

Mr. Miller’s Occupational History. Mr. Miller, a lifelong non-smoker, was twenty years old when he began working at the Shawnee Steel Company’s primary steel mill in Cartersville, Shawnee. R. at 2. Since its opening in 1950, the steel mill operated in accordance with standard mid-century industry practices, and its machinery was heavily insulated with asbestos. *Id.* In his role in the maintenance department, Mr. Miller regularly handled this machinery. *Id.* In the 1970s, following Occupational Safety and Health Administration’s standards, the steel mill ceased using asbestos. *Id.* The Cartersville plant where Mr. Miller worked retained their original asbestos insulation. *Id.* Safety protocols were loosely enforced at the plant and Mr. Miller frequently worked without respiratory protective equipment. *Id.* He worked at the steel mill plant from 1970 until his retirement in 2016. *Id.* The Cartersville steel mill closed in 2016. R. at 3.

The Medically Underserved Landscape of Simmons County. Cartersville is located in rural Simmons County in Shawnee. R. at 2. After the steel mill closure in 2016, Simmons County experienced a severe population decline, dropping to

approximately 7,500 residents. R. at 3. During this time, it also lost over 75% of its healthcare professionals. *Id.* Both of its local hospitals closed in 2015, leaving no urgent care facilities, no permanent diagnostic imaging centers, and only three primary care practices in the county. *Id.* MHS's flagship hospital remained the nearest source of in-person radiology consultations and CT scans. *Id.* It was located in Goshen, 190 miles, or a three-and-a-half-hour drive, away from Cartersville. *Id.* State and federal authorities designated Simmons County as both a Health Professional Shortage Area and a Medically Underserved Area. *Id.*

The Telehealth Platform. MHS is a regional healthcare network based in Goshen. *Id.* In 2012, MHS contracted with Cyber-Care Solutions, LLC ("CCS"), a digital health infrastructure provider. *Id.* CCS was contracted to design and host a proprietary remote telehealth platform for MHS. *Id.* Although CCS designed and hosted the platform, MHS exclusively controlled its patient-facing interface. *Id.* MHS displayed their own branding throughout the platform and prohibited any CCS marks on all patient-facing pages. *Id.*

Patients accessed the telehealth platform through MHS's primary domain. *Id.* On the login page, the site displayed the message "*By entering the portal, I accept the MHS Terms and Conditions.*" *Id.* The words "Terms and Conditions" were displayed as a hyperlink in blue, underlined text. *Id.* Clicking the hyperlink opened a standalone webpage containing thirty-four lines of single-spaced, unformatted black text on a plain white background. *Id.* The font size of this text

was noticeably smaller than the rest of the platform's website. *Id.* Approximately three-quarters down the page, the terms stated:

All clinical evaluations, imaging reviews, and diagnostic interpretations provided through this digital portal are performed by independent contractor physicians or automated software applications developed by another company. The physicians and software are not employees or agents of Metropolitan Health System. MHS exercise no operational control over the clinical judgment or diagnostic methods used by the independent contractor physicians or any automated software applications.

R. at 3-4.

Audit logs show that Mr. Miller clicked the hyperlink once on April 9, 2018, remained on the page for four seconds, and never accessed the link again during subsequent logins. R. at 4.

Cyber MD's FDA Clearance, Algorithmic Flaws, and Subsequent Retraining. Cyber MD, the platform's diagnostic software, is a conversational artificial intelligence system developed by CCS. *Id.* The initial version of CCS was trained on a dataset of 40,000 images collected across three hospital systems and reported a 97% overall accuracy in classifying lung lesions. *Id.* It received FDA clearance in February 2017. *Id.* MHS integrated Cyber MD into its telehealth platform on March 1, 2017. *Id.*

Before launching a Cyber MD chat session, users were prompted to navigate a pop-up box displaying the following message in red, 16-point font: "*Cyber MD is not a licensed health care professional. It is an artificial intelligence software program.*" *Id.*

In October 2022, CCS discovered that Cyber MD’s diagnostic accuracy dropped to 85% when evaluating images of patients with prior occupational asbestos exposure because pleural shadowing masked underlying tumors. R. at 4–5. CCS retrained the software using a dataset of 10,000 asbestos-exposed images, which restored its high diagnostic accuracy. R. at 5. CCS released the updated software on December 13, 2023, without public disclosure. *Id.*

Mr. Miller’s Misdiagnosis by Cyber MD and Subsequent Death. On April 9, 2018, prior to the discovery of Cyber MD’s drop in accuracy, Mr. Miller, experiencing shortness of breath, logged into MHS’s telehealth portal and initiated a Cyber MD session. R. at 5. As part of the virtual intake session, Mr. Miller disclosed his occupational history with asbestos at the steel mill. *Id.* Cyber MD ordered a chest X-ray and CT scan for Mr. Miller through a mobile radiology service visiting Cartersville and informed Mr. Miller: “*Once I have your scans, I will analyze them closely, and go over the results with you.*” *Id.*

Two weeks later, Cyber MD evaluated the scans. *Id.* It reported the results to Mr. Miller as having “zero evidence” of malignancy, diagnosed him with adult-onset asthma, and referred him to a local practitioner for inhaler management. *Id.* It then recommended annual follow-up imaging. *Id.* Mr. Miller subsequently complied with Cyber MD’s recommended follow-up imaging, completing evaluations in 2019, 2020, and 2021. *Id.* During each annual evaluation, Cyber MD reviewed new scans and reiterated that there was “zero evidence” of disease. *Id.* After the 2021 evaluation, Cyber MD advised Mr. Miller that annual imaging was no longer necessary. *Id.*

On October 30, 2023, Mr. Miller suffered a spontaneous pneumothorax. *Id.* He was airlifted to MHS's hospital in Goshen. *Id.* Scans revealed extensive metastatic lung cancer, with a 6.4 cm malignant mass in his left lung with metastases to the pleura and spine. *Id.* Retrospective expert review of his 2018 scans established that a 7 mm lesion, partially obscured by pleural changes. *Id.* These reviews revealed that the lesion had grown continuously to 47 mm by 2021. *Id.* Cyber MD's baseline 2017 algorithm had consistently failed to identify the lesion. *Id.*

Mr. Miller died on April 14, 2024, at seventy-four years old. R. at 6.

Respondent's Claim. Respondent filed this action in July 2024. *Id.* She asserts claims against MHS for vicarious liability under the doctrine of apparent agency based on Cyber MD's errors and claims against CCS for strict product liability based on design defect and failure to warn. R. at 1. MHS contended that it could not be held vicariously liable under apparent agency because Cyber MD was not a MHS employee or agent and because MHS's Terms and Conditions disclaimed an agency relationship. *Id.* MHS and CCS further asserted that Shawnee's Revised Statutes §§ 12-404 and 12-410 barred Respondent's claims. R. at 1-2.

II. NATURE OF PROCEEDINGS

The Circuit Court of Simmons County. Respondent, individually and as Special Administrator of the Estate of Elias Miller, filed suit against MHS and CCS following the death of her husband, Elias Miller. R. at 1. Respondent asserted a

claim against MHS for the diagnostic errors of CCS's Cyber MD system under the doctrine of apparent agency. *Id.* Respondent also asserted claims against CCS for strict product liability based on design defects and algorithmic flaws of its Cyber MD software. *Id.* Following the close of discovery, MHS and CCS moved for summary judgment pursuant to Shawnee Rule of Civil Procedure 56. *Id.* On March 6, 2025, the circuit court GRANTED MHS's and CCS's Motion for Summary Judgment, concluding that no genuine issues of material fact remained and that they were entitled to judgment as a matter of law. R. at 2. The circuit court also DISMISSED Respondent's complaint with prejudice. R. at 12.

The Shawnee Court of Appeals for the Second District. Respondent appealed the circuit court's grant of summary judgment and dismissal of her complaint to the Shawnee Court of Appeals for the Second District. R. at 14. On February 24, 2026, the Court of Appeals REVERSED and REMANDED. R. at 25. The Court of Appeals concluded that genuine issues of material fact remained regarding whether the underlying agreement was unconscionable and whether Mr. Miller assented to the provision disclaiming an agency relationship. *Id.* The Court of Appeals further concluded that Shawnee's statutes of repose did not bar Respondent's claims. *Id.*

The Supreme Court of Shawnee. MHS and CCS petitioned this Court for leave to appeal pursuant to Shawnee Supreme Court Rule 315. R. at 26. This Court granted the petition and limited the review to two questions: (1) whether MHS can be held vicariously liable under the doctrine of apparent agency for the diagnostic

errors of an autonomous AI software tool integrated into its branded telehealth platform; and (2) whether Respondent's claims are barred by Shawnee's four-year statutes of repose or whether the repose periods were extended by Cyber MD's annual diagnostic evaluations or by statutory exceptions applicable to a latent, undiscoverable flaw in the algorithm. *Id.*

SUMMARY OF THE ARGUMENT

This case centers on a patient who entrusted his medical care to a healthcare system's AI-integrated platform, only to have that technology repeatedly fail to detect his developing cancer.

Innovations in technology may change how healthcare is delivered, but they do not alter the longstanding legal doctrines that govern responsibility for that care. Established legal doctrines of agency, contract formation, and tort liability remain capable of addressing innovations in healthcare delivery without abandoning the protections they were designed to provide.

This Court should therefore apply the principles of existing law to the circumstances of this case and affirm the Court of Appeals' judgment that genuine issues of material fact remain as to MHS's vicarious liability under the doctrine of apparent agency and that Respondent's claims are timely under Shawnee's Revised Statutes.

I.

This Court should find MHS vicariously liable for the diagnostic errors of an autonomous AI software tool integrated into its telehealth platform.

Vicarious liability is “indirect legal responsibility.” BLACK’S LAW DICTIONARY 1404 (5th ed.1979). Under this theory, courts can hold a party legally responsible for the negligence of another, not because the party did anything wrong but rather because of the party’s relationship to the wrongdoer. *See* KEETON, TORTS § 69. Apparent agency extends that principle to circumstances in which a principal creates the reasonable appearance that another is acting on its behalf and a third party reasonably relies on that appearance. *See* Restatement (Second) of Agency § 267.

The autonomous nature of CCS’s Cyber MD software does not preclude application of this doctrine. Apparent agency turns on the principal’s manifestations and the patient’s reasonable reliance, not on the technological form of the agent. Courts have applied these principles as healthcare delivery has evolved beyond traditional hospital settings. *See Webster v. CDI Ind., LLC*, 917 F.3d 574, 577-79 (7th Cir. 2019); *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1240-41 (11th Cir. 2014). The same principles should apply when a healthcare system chooses to integrate an autonomous AI software tool into its own telehealth platform for patient care.

MHS presented CCS’s software to Mr. Miller through its own branded telehealth platform without adequately disclosing that CCS was an independent contractor. Mr. Miller unaware of that relationship, reasonably relied on MHS to

provide and manage his care. Apparent agency principles should therefore be applied to these circumstances.

II.

This Court should find that Respondent's claim was timely because Mr. Miller followed a continuous course of treatment and because the latent, undiscoverable nature of Cyber MD's algorithmic flaw is such that it falls under an exception in Shawnee's Revised Statute of Repose.

The continuous treatment doctrine is aimed at safeguarding trust and confidence between healthcare providers and their patients. *See Otto v. Nat'l Inst. Of Health*, 815 F.2d 985, 988 (4th Cir. 1987). It prevents the premature disruption of clinical care and gives providers the opportunity to rectify medical errors. *Id.*

The Shawnee statute of repose differs from the typical statute of repose because instead of absolutely barring an action, it provides an exception if the injury-causing aspect of the product was not discoverable by an ordinary reasonably prudent person. *See Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 712 (1990) (examining the difference between a typical statute of repose and one with an affirmative defense). The legislative intent of a statute of repose such as the one in Shawnee, is to "to provide for the maximum length of time products sellers are subject to liability." *See Idaho Product Liability Reform Act*, ch. 225, 1980 Idaho Sess. Laws 499 (explaining the legislative intent of Idaho's statute of repose was expressly stated in the 1980 Session Laws).

ARGUMENT

Standard of Review. This appeal raises two legal questions. The first issue, whether the doctrine of apparent agency may extend to an autonomous AI healthcare platform, involves both questions of fact and law. When applying the law to established facts requires courts to expound on the law, amplify or elaborate on a broad legal standard, or develop auxiliary legal principles for use in other cases, the ultimate question is treated as one of law and must be reviewed *de novo*. *U.S. Bank N.A. v. Village at Lakeridge, LLC*, 583 U.S. 387, 396, 138 S. Ct. 960, 200 L.Ed.2d 218 (2018).

The second issue requires this Court to interpret the scope and application of Shawnee Revised Statutes §§ 12-404 and 12-410. Statutory interpretation presents a question of law and is reviewed *de novo*. *Frontier Airlines, Inc. v. Dep't of Homeland Sec.*, 173 F.4th 1158, 1165 (10th Cir. 2026).

I. MHS SHOULD BE HELD LIABLE UNDER THE DOCTRINE OF APPARENT AGENCY FOR CCS'S ERRORS BECAUSE MHS CREATED THE APPEARANCE OF CCS ACTING ON ITS BEHALF AND MR. MILLER REASONABLY RELIED ON THAT APPEARANCE.

MHS should be held liable under the theory of apparent agency for CCS's diagnostic errors because Mr. Miller reasonably relied on the appearance that CCS was acting on MHS's behalf.

The doctrine of apparent agency protects third parties who reasonably rely on a principal's manifestation that a contractor is acting on the principal's behalf by

imposing liability for physical harm caused by the negligence of that contractor. *See* Restatement (Second) of Torts § 429, *see also* Restatement (Second) of Agency § 267. In the hospital context, an apparent agency relationship is established where: (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the hospital had knowledge of and acquiesced in those acts; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 525 (1993) (quoting *Pamperin v. Trinity Memorial Hospital*, 144 Wis. 2d 188, 207-08 (1988)).

When evaluating whether an apparent agency relationship exists, courts must look to the reasonableness of the patient's belief that the hospital or its agents were rendering the patient's care. *Sword v. NKC Hosp., Inc.*, 714 N.E.2d 142, 152 (Ind. 1999). This inquiry considers the totality of the circumstances, including a hospital's actions or inactions, as well as any special knowledge the patient may have had about the hospital's arrangements with its agents. *Id.* This doctrine is not confined to services rendered within a traditional hospital setting. *See Webster*, 917 F.3d at 577-79. Rather, courts have recognized that changes in the delivery of modern medical care require apparent agency principles to account for increasingly diverse agency relationships. *See Franza*, 772 F.3d at 1240-41. This principle extends to remote medical care situations, where courts continue to examine

whether, under all the surrounding circumstances, a patient could reasonably believe that a remote provider was acting on behalf of the principal. *See Snyder v. State*, 138 N.Y.S.3d 802, 808–09 (N.Y. Ct. Cl. 2020).

A. MHS Created the Appearance That CCS was Acting on its Behalf By Contracting with CCS and Exclusively Branding Its Telehealth Platform with MHS Labeling.

An apparent agency relationship existed between MHS and CCS. MHS knowingly contracted with CCS to design and host a proprietary remote telehealth platform through which Mr. Miller received diagnostic services. R. at 3, 5. MHS also allowed CCS’s platform to operate as part of MHS’s provision of care, exclusively displaying MHS branding throughout the interface. R. at 3. Furthermore, MHS affirmatively prohibited any CCS labeling on patient-facing pages. *Id.* MHS knew of and acquiesced in CCS’s conduct which created the appearance that it was acting on MHS’s behalf, thus satisfying the second element for establishing an apparent agency relationship.

The remaining questions of whether MHS created the appearance that CCS was its agent and whether Mr. Miller justifiably relied on that appearance are addressed below.

B. MHS Held Itself Out as Mr. Miller’s Care Provider by Failing to Adequately Inform Mr. Miller That His Care Was Being Provided by a Contracted Third-Party.

The “holding out” element is essential for establishing an apparent agency relationship. In a hospital setting, this is satisfied if a hospital holds itself out as a

complete provider of care without adequately informing the patient that the care is rendered by independent contractors or third-party automated systems. *Gilbert*, 156 Ill. 2d at 525.

MHS held themselves out as Mr. Miller's complete provider of care. Although MHS contracted CCS to design and host the remote telehealth platform, MHS had exclusive control of the platform and displayed only their branding on the platform. R. at 3. They went so far as to prohibit CCS from displaying their branding on any patient-facing page. R. at 3. Visually, there was no way that Mr. Miller could have known that MHS was not his complete care provider. The only other way that Mr. Miller could have known that his care was being rendered in any way by CCS was if MHS had made it adequately known otherwise. They did not.

1. MHS's inconspicuous Terms and Conditions failed to adequately inform Mr. Miller that his care was being rendered by a third-party contractor.

The only disclosure that MHS was using a third-party contractor for their software appeared in the telehealth platform's Terms and Conditions statement. Those terms appeared through MHS's "sign-in-wrap" agreement, which did not require Mr. Miller to separately acknowledge or accept the terms before accessing the platform. R. at 3-4.

A "sign-in-wrap" agreement couples a user's assent to a website's "terms of use" with the user's use of that website's services. *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 399 (E.D.N.Y. 2015). These internet contracts do not require the user to

separately indicate acceptance of those terms. *Id.* Where a website operator cannot establish that a user had actual knowledge of the agreement, the user's meaningful assent, and thus a binding contract, exists only if: (1) the website provides reasonably conspicuous notice of the terms to which the user will be bound; and (2) the user takes some action, such as clicking a button or checking a box, that unambiguously manifests assent to the terms. *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022).

The way the terms were presented on the telehealth platform reflected a “sign-in-wrap” agreement. When Mr. Miller logged into the platform, it displayed the message “*By entering the portal, I accept the MHS Terms and Conditions.*” R. at 3. Although the Terms and Conditions were hyperlinked within the statement, the platform did not require Mr. Miller to click an “I agree” button, or otherwise affirmatively indicate his acceptance of those terms before accessing the platform. R. at 3-4.

Mr. Miller’s decision to click MHS’s Terms and Conditions hyperlink does not unambiguously establish his assent to the terms or the agency disclaimer contained within them. Mere access to terms is distinct from an affirmative manifestation to be bound by them. Even if the platform provided reasonably conspicuous notice of the terms through a hyperlink, MHS cannot establish that Mr. Miller unambiguously manifested his assent. Clicking the hyperlink merely opened the Terms and Conditions on a separate webpage. The terms appeared in noticeably smaller text spanning thirty-four single-spaced lines, with the agency disclaimer

clause buried deep into the text. Mr. Miller accessed that page only once and remained on it for approximately four seconds. Although the platform stated that entering the portal constituted acceptance of MHS's Terms and Conditions, it did not require Mr. Miller to affirmatively accept those terms. Thus, the absence of a separate manifestation of assent combined with the manner in which MHS presented the terms undermines any inference that Mr. Miller had actual notice that CCS, rather than MHS, was providing his care.

Mr. Miller's brief access to the Terms and Conditions did not provide meaningful notice that CCS was an independent contractor, nor did he possess any special knowledge that would have alerted him as to the relationship between MHS and CCS. Nothing in his interactions with MHS's platform, apart from the buried agency disclaimer, indicated that CCS was involved in providing his medical care.

This is further compounded by the fact that Mr. Miller could not have reasonably accessed other means of healthcare. Mr. Miller lived in a rural county lacking proper healthcare infrastructure. R. at 2-3. In the years following his retirement, the county lost over seventy-five percent of its healthcare professionals. R. at 3. There were no local hospitals, urgent care facilities, or diagnostic imaging centers available within a reasonable distance. *Id.* His county was officially designated as both a Health Professional Shortage Area and a Medically Underserved Area. *Id.* Given the absence of reasonable healthcare alternatives, Mr. Miller's use of MHS's telehealth platform reflected necessity rather than a

voluntary and affirmative manifestation of assent to the terms of the telehealth platform.

Even if the Court concludes that entering the platform manifested an affirmative assent to MHS's Terms and Conditions, the circumstances surrounding the agreement support a finding of procedural unconscionability. Procedural unconscionability occurs when one party has such superior bargaining power that the other party lacks a "meaningful choice" to enter into the contract. *Hines v. Nat'l Ent. Grp., LLC*, 140 F.4th 322, 328 (6th Cir. 2025). To determine whether a contract is procedurally unconscionable, courts look at factors such as age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice. *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1194 (11th Cir. 2023); *Hines*, 140 F.4th at 328.

As described above, Mr. Miller, who was an elderly and retired man, faced several structural barriers in accessing quality healthcare. Even if he had preferred to seek in-person care, his closest hospital was three and a half hours away. MHS's telehealth platform offered one of his few practical means of obtaining care. MHS's superior bargaining power, the inconspicuous placement of a non-negotiable agency disclaimer, and Mr. Miller's lack of meaningful choice, collectively support a finding of procedural unconscionability.

Considering the totality of the circumstances, MHS cannot establish that Mr. Miller knew or should have known that CCS was an independent contractor. The agency disclaimer was buried deep within the Terms and Conditions using inconspicuous text, appeared nowhere else within the patient-facing pages, and the circumstances under which it was utilized raises unconscionability questions.

Therefore, MHS's Terms and Conditions failed to establish Mr. Miller's assent to a binding agreement and failed to provide adequate notice that CCS was an independent third-party provider.

C. Mr. Miller's Conduct Was Consistent With That Of Ordinary Care And Prudence Because He Relied On MHS's Platform To Provide His Medical Care and Followed Its Care Recommendations.

Mr. Miller acted consistently with ordinary care and prudence in relying on MHS to manage his medical care.

Under *Gilbert*, a patient acts consistently with ordinary care and prudence when the patient reasonably relies on a hospital to provide complete care and does not know, or have reason to know that their particular provider is an independent contractor. *See Gilbert*, 156 Ill. 2d at 525-26. A patient's reliance is presumed when a hospital fails to give meaningful notice of a provider's arrangement, the patient had no special knowledge regarding the arrangement, and when there is no reason that the patient should have known of the employment relationships. *Sword*, 714 N.E.2d at 152.

As established above, MHS failed to provide meaningful notice of its contractual relationship with CCS, and Mr. Miller lacked special knowledge of that relationship. Because MHS failed to otherwise communicate this relationship to its patients and because they presented only their branding throughout the platform, Mr. Miller had no reason to know that CCS was an independent contractor. Under *Sword*, his reliance may therefore be presumed. *Id.*

Mr. Miller's conduct further demonstrates that his reliance on MHS was reasonable and consistent with ordinary care and prudence. During his telehealth encounters through MHS's portal, he disclosed his occupational history and prior asbestos exposure, completed the chest X-ray and CT scans requested by the platform, and complied with each annual virtual follow-up evaluation. R. at 5. By providing MHS with the information necessary to assess his condition and following the course of care presented to him through MHS's platform, Mr. Miller reasonably entrusted MHS with the management of his care.

Additionally, Mr. Miller was precisely the type of patient for whom remote telehealth platforms provide particular value. A unique benefit of remote-care technologies is their ability to provide healthcare access to patients in underserved communities who might otherwise lack reasonable access to medical services. Mr. Miller resided in a medically underserved rural county with clear healthcare barriers such as no reasonable access to a local hospital, urgent care facility, or permanent diagnostic imaging center. R. at 3. MHS offered its telehealth platform as a means of providing medical care to patients facing these types of barriers. It

should not, however, be permitted to avoid responsibility for the diagnostic failure of the third party through which those services were delivered.

MHS should not be allowed to escape liability where it created the appearance of acting as the complete provider of care, and Mr. Miller, exercising ordinary care and prudence, reasonably relied on that appearance in receiving care.

II. RESPONDENT'S MEDICAL MALPRACTICE AND PRODUCT LIABILITY CLAIMS ARE NOT TIME-BARRED BY SHAWNEE'S STATUTE OF REPOSE BECAUSE CYBER MD MEETS THE EXCEPTION CRITERIA.

Respondent's claims are timely under both of Shawnee's statutes of repose because each statute contains an express exception that fits the undisputed record. Section 12-404(b)'s repose period does not bar an action against a healthcare provider that engaged in a continuous course of treatment for the same condition, and that is the care MHS provided through Cyber MD. In April 2018, Cyber MD prescribed annual follow-up imaging for Mr. Miller's asbestos-related pulmonary condition. Mr. Miller followed that plan until Cyber MD discharged him from monitoring in June 2021. The twelve-month interval the provider itself prescribed does not break that continuity, and nothing in the statute exempts care delivered through software that MHS branded as its own. The repose period therefore ran from June 2021, and this July 2024 action is timely. Section 12-410(b)(3) likewise makes the product liability repose period inapplicable when the injury-causing aspect of the product was not discoverable by an ordinary reasonably prudent person within four years of delivery. Cyber MD's reduced accuracy for asbestos-

exposed patients was the exact kind of hidden defect the statutory exception was meant to encapsulate. CCS itself did not identify it until more than five years after delivery. This Court should therefore affirm the judgment of the Court of Appeals.

A. The Statute of Repose Governing Respondent’s Medical Malpractice Claim against MHS Did Not Begin to Run Until 2021 Because Cyber MD Engaged in a Continuous Course of Treatment of Mr. Miller for the Same Condition.

Section 12-404(b) imposes a four-year statute of repose on healthcare malpractice claims, but expressly provides that the period “shall not bar an action where the defendant healthcare provider engaged in a continuous course of treatment of the patient for the same illness, injury, or condition that gives rise to the claim of negligence.” Shawnee Rev. Stat. § 12-404(b). The continuous-treatment doctrine protects a patient’s ability to rely on an ongoing course of care without being forced to interrupt that relationship, or sue the very provider currently caring for him, in order to preserve a claim. *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1081 (2d Cir. 1988). This doctrine applies when a provider continues to treat or monitor the same underlying illness, injury, or condition, even when the individual encounters occur at substantial intervals. *Castillo v. Emergency Med. Assocs., P.A.*, 372 F.3d 643, 648 (4th Cir. 2004); *Med. Liab. Mut. Ins. Co. V. Alan Curtis LLC*, 519 F.3d. 466 (8th Cir. 2008).

The Circuit Court held that Mr. Miller’s four Cyber MD sessions were “separate, discrete, and independent diagnostic screenings spaced twelve months apart” and therefore did not constitute continuous treatment. R. at 12. That holding

conflates frequency with continuity and treats the frequency of the visits as dispositive rather than asking whether the visits were part of an ongoing course of care for the same treatment. Neither Shawnee Rev. Stat. § 12-404(b) or the case law applying analogous continuous-treatment doctrines require treatment to occur at any particular frequency. What it does require is that the visits form part of a single, defined program of monitoring or management directed at one condition. This is precisely what the undisputed record demonstrates.

1. The undisputed facts establish a continuous program of monitoring for Mr. Miller's asbestos-related pulmonary condition.

Mr. Miller did not return to Cyber MD each year with unrelated complaints. His repeated visits arose from the same asbestos-exposure related pulmonary risk, first identified during his April 9, 2018, Cyber MD consultation after he reported his thirty-five-year occupational history. R. at 4-5. During that same visit, Cyber MD did more than provide a one-time assessment. It (1) ordered imaging, (2) diagnosed adult-onset asthma, (3) referred him for inhaler management, and (4) affirmatively prescribed a monitoring protocol, specifically they “recommended annual follow-up imaging.” R. at 5.

Mr. Miller followed that protocol exactly as prescribed by Cyber MD. He returned in May 2019, May 2020, and June 2021, and at each visit Cyber MD reviewed new imaging against the same underlying pulmonary condition against initial baseline images and reaffirmed that there was “zero evidence” of malignancy. R. at 5. The course of care therefore had a beginning, when Cyber MD established

the annual monitoring protocol in 2018; a defined course (three years of annual compliance for the same condition); and a defined end, when Cyber MD unilaterally discharged Mr. Miller from further monitoring in 2021. *Id.*

The facts of this matter fit within the purpose of the continuous-treatment doctrine. Cyber MD established a monitoring plan for a specific condition, Mr. Miller complied with that prescribed plan, and Cyber MD repeatedly evaluated that same condition against baseline until it determined that further monitoring was unnecessary and terminated the relationship. The twelve-month intervals do not break that continuity. It demonstrates the interval that the care provider itself designated as medically appropriate.

Using the annual visits as evidence of discontinuity would penalize a patient who follows the health provider's monitoring instructions as prescribed and deny them the protection of the continuous-treatment doctrine simply because the provider determined that annual, rather than monthly, monitoring was medically appropriate. The better measure is whether the visits were connected by an ongoing course of treatment for the same condition, not how many months passed between them. Courts applying the continuous-treatment doctrine have similarly recognized that periodic monitoring or follow-up may constitute continuous treatment when those encounters are part of an ongoing course of care directed at the same underlying suspected or developing condition. *Alan Curtis LLC*, 519 F.3d. 466; *Castillo*, 372 F.3d. at 648. Mr. Miller should not be penalized for following the provider's plan of care.

2. MHS cannot avoid the continuous-treatment exception merely because it provided diagnostic services through an automated platform.

The ongoing treatment relationship between Mr. Miller and Cyber MD created exactly the type of relationship the continuous-treatment doctrine was meant to protect because of the manner in which MHS chose to present and operate Cyber MD.

MHS integrated Cyber MD into its own healthcare delivery system. The platform displayed MHS branding; CCS was prohibited from placing its own marks on patient-facing portions of the platform, and patients accessed Cyber MD exclusively through MHS's own domain. R. at 3-4. MHS therefore presented Cyber MD to patients not as an independent piece of software, but as a means through which patients received diagnostic services on its telehealth platform.

Having integrated and presented Cyber MD as MHS's own mechanism for providing ongoing patient care, MHS cannot now argue that the very same tool is incapable, as a matter of law, of satisfying the "continuous course of treatment" that §12-404(b) protects. Nothing in the statutory text limits the exception based on the particular tool or technology through which the provider renders treatment. MHS is a healthcare provider, and it elected to use Cyber MD to monitor Mr. Miller's pulmonary condition over a period of four years. MHS cannot obtain the benefit of presenting itself to be a full-service, integrated provider for the purposes of apparent agency, while simultaneously disclaiming the continuity of the treatment relationship that presentation created.

Furthermore, there is no indication that the Shawnee legislature intended to exempt automated or algorithmic-mediated care from §12-404(b). When the legislature creates an express exception to a statute of repose, courts generally give effect to the exception as written rather than narrow them by implication. *CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014); *Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 507, 137 S. Ct. 2042, 2050 (2017). Section 12-404(b) contains no distinction between treatment delivered personally by a physician, and treatment delivered through technology selected and deployed by a healthcare provider. Reading such a limitation into the statute would grant healthcare provider networks broader repose protection precisely because they replaced physicians with software. Such a reading would afford healthcare providers greater repose protections simply because diagnostic monitoring was performed by software rather than a physician or other human-based monitoring program.

3. Because the continuous course of treatment was continued through June 2021, Respondent’s claim against MHS was timely.

When the continuous-treatment exception applies, the repose period begins when the continuous course of treatment ends rather than when it begins. *Alan Curtis LLC*, 519 F.3d 466; *Miller v. United States*, 932 F.2d 301 (4th Cir. 1991). Mr. Miller’s course of treatment for his asbestos-related pulmonary condition began when Cyber MD established the annual monitoring protocol in April 2018, and continued through his June 2021 visit, when Cyber MD discharged him from further imaging. R. at 5. Accordingly, the four-year repose period did not begin to

run until June 2021. The Respondent commenced this action in July 2024 — approximately three years later — placing it comfortably within the four-year period provided by §12-404(b). Because the Circuit Court treated annual intervals between Cyber MD visits as defeating continuity despite an undisputed, provider-directed course of monitoring for the same condition, its application of the statute of repose was too narrow.

B. Respondent’s Product Liability Claim is Tolled Under Shawnee’s Statute of Repose Because Cyber MD’s Algorithmic Flaw Was Latent and Un-Discoverable.

Respondent’s product liability claim is not barred by Shawnee’s Statute of Repose. Section 12-410 governs the claim, it provides an express exception to its four-year repose period, and it is applicable to a latent, undiscoverable product defect. Because Cyber MD’s algorithmic flaw was latent and could not reasonably have been discovered, Respondent’s claim falls within the statutory exception.

1. Shawnee’s Statute of Repose governs Respondent’s product liability claim.

In a product liability claim, statutes that specifically address product liability control over general statutes that address personal injury or wrongful death. *See Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 661 (1992) (analyzing when a product liability statute controls over a general statute of personal injury and wrongful death); *See Szoboszlay v. Glessner*, 233 Kan. 475, 479 (1983) (analyzing when a statute controls over another). “It is a cardinal rule of law that ‘statutes

complete in themselves, relating to a specific thing, take precedence over general statutes.” *Szoboszlay*, 233 Kan. at 479.

Shawnee’s statute of repose § 12-410 specifically addresses product liability and Shawnee’s statute of limitations of actions § 12-402, only generally addresses personal injury and wrongful death. Therefore, § 12-410 controls over § 12-402.

2. Shawnee’s Statute of Repose includes an express statutory exception applicable to Cyber MD’s algorithmic flaw.

Shawnee Rev. Stat. § 12-410 includes an express exception:

(b) *Exceptions to Statute of Repose.* The four (4) year period of repose – shall – not apply if . . . 3. the injury-causing aspect of the product that existed at the time of delivery was not discoverable by any ordinary reasonably prudent person until more than (4) four years after the time of delivery.

The Court must apply the legislature’s exception as written when the statute is plain and unambiguous. *Szoboszlay*, 233 Kan. at 478, 664 P.2d at 1330. Principles of statutory construction provide that words in a statute are to be given their plain and ordinary meaning in arriving at the proper construction of a statute. *Id.*

Section 12-410 plainly states that the four-year repose period “shall not apply” if the “injury causing aspect of the product that existed at the time of delivery was not discoverable by any ordinary reasonably prudent person until more than four years after the time of delivery.” The statute’s use of “shall” is mandatory, not permissive. *See Szoboszlay*, 233 Kan. at 482, 664 P.2d at 1333.

Therefore, if the injury-causing aspect of the product – here, Cyber MD’s algorithmic flaw – was un-discoverable by an ordinary reasonably prudent person, such as Mr. Miller, then the four-year period of repose does not apply.

3. Respondent's claim is not barred because Cyber MD's latent algorithmic flaw satisfies the statutory exception.

Respondent's claim is tolled because the legislature clearly intended to allow for alteration to the four-year statutory period. *ANZ Sec., Inc.*, 582 U.S. 497, 506-08, 137 S. Ct. 2042, 2050. Generally, a statute of repose is absolute, lacking in tolling provisions, and the statutory time period for bringing a product liability claim starts from the date of delivery of the product. *See Harding*, 250 Kan. at 662, 670. However, tolling is warranted when the legislature clearly intended to allow for tolling through an express statutory exception. *ANZ Sec., Inc.*, 582 U.S. at 507, 137 S. Ct. at 2050.

A statute of repose's time limit may be tolled if the claim satisfies an express statutory exception. *Arnold v. Riddell, Inc.*, 882 F. Supp. 979, 988 (D. Kan. 1995). Shawnee's express statutory exception is similar to the Kansas statute of repose § 60-3303(b)(2)(D), and the Idaho statute of repose § 6-1403. Both statutes create a statutory exception "if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than 10 years after the time of delivery." Kan. Stat. Ann. § 60-3303(b)(2)(D) (West 1992); § Idaho Stat. Ann. § 6-1403 (West 2005).

Respondent's product liability claim is tolled because Cyber MD's algorithmic flaw being un-discoverable by a reasonably prudent person satisfies Shawnee's express statutory exception. In *Arnold*, a high school football player was injured due to defective helmet padding that was not discoverable by a reasonably prudent

person. *Arnold*, 882 F. Supp. at 988-89. The court held the football player's claim was tolled because it undisputably met the statutory exception. *See Id.* In a Kansas Court of Appeals case, an owner of a riding lawn mower was injured by putting his hand between moving parts and it would have been obvious to a prudent person that an attempt to use the manual valve while the engine's motor was running could result in injury. *Baumann v. Excel Industries, Inc.*, 17 Kan. App. 2d 807, 818-19, 845 P.2d 65, 73-74 (Kan. Ct. App. 1993). Here, the court held the lawn mower owner's claim was time-barred because it did not meet the statutory exception. *Id.*

In an Idaho Supreme Court case, an adult car passenger was injured during a collision while riding in the rear seat and it would have been obvious to a prudent person that the rear seat was too small and narrow for an adult. *Oats v. Nissan Motor Corp.*, 126 Idaho 162, 163-64 (1994). Here, the court held the rear seat being too small and narrow for an adult was time-barred because it did not satisfy the statutory exception. *Id.* at 166-67.

Mr. Miller had an undiagnosed malignant lung tumor that Cyber MD did not identify due to an algorithmic flaw that was un-discoverable by any ordinary reasonably prudent person. R. at 5. Cyber MD's algorithmic flaw therefore falls within Shawnee's express statutory exception, and Respondent's product liability claim should not be barred by the four-year statute of repose.

4. Cyber MD's Algorithmic Flaw Falls Within the Statutory Exception Because It Was Un-Discoverable.

Cyber MD's algorithmic flaw was un-discoverable by an ordinarily prudent person. A product flaw is un-discoverable when the user cannot discover "the defect by inspection or by normal, prudent use" of the product. *Arnold*, 882 F. Supp. at 988.

A product flaw is un-discoverable when the user cannot discover "the defect by inspection or by normal, prudent use" of the product. *Id.* In *Arnold*, the high school football player suffered a neck injury due to defective helmet padding that did not absorb the force of the tackle. *Arnold*, 882 F. Supp. at 986. The padding defect was not discoverable because the energy attenuating testing procedures necessary to detect the defect would not be available to the average high school football player who is a reasonably prudent user of the football helmet. *Arnold*, 882 F. Supp. at 988. The court held that the padding defect was not discoverable by a reasonably prudent person because expert testimony provided from biomechanical engineers had to test the helmet padding "with everything from sophisticated instruments, such as accelerometers (used to measure force levels), to cadavers (used for evaluating the effects on the human body of impacts to the top of the head)." *Id.* The helmet padding defect in *Arnold* is analogous to Cyber MD's algorithmic defect because neither could be detected by a reasonably prudent user through ordinary use of the product. For Mr. Miller, the algorithmic flaw was un-discoverable because the necessary data and testing needed to detect the flaw would

not be available to the average patient who is a reasonably prudent user of Cyber MD.

In contrast, a defect is discoverable when an ordinary prudent person can reasonably detect the danger and guard against it. *Baumann, Inc.*, 17 Kan. App. 2d 807, 819, 845 P.2d 65, 73 (1993). In *Baumann*, the owner of a riding lawn mower had four fingers severed when he placed his hand between moving parts of the mower to use the manual valve and pump fuel into the engine. *Baumann*, 17 Kan. App. 2d at 809, 845 P.2d at 68. Here, the court held the injury-causing aspect of the lawn mower would have been discoverable to a reasonably prudent person because they would have read the manual, known where the manual valve was located, and would have seen the proximity of the valve to the moving belts and pulleys. *Id.* at 819, 74. In *Oats*, the adult car passenger was rendered a quadriplegic during the collision while riding in the rear seat that was too small and narrow for an adult to safely sit there. Here, the court held the rear seat being too small and narrow for an adult would have been discoverable to the ordinary reasonably prudent person. *Id.* at 166-67.

However, under the circumstances of this case, would a careful person, such as Mr. Miller, without placing himself in danger, have been able to comprehend the danger and determine how to avoid the danger? *Baumann*, 17 Kan. App. 2d at 819. A careful person would have made an appointment with his doctor's office, logged into his MHS portal to access CCS's Cyber MD, and disclose his medical concerns to Cyber MD. It would be unreasonable to require a patient to once in the

appointment, run a diagnostic data test to determine what percentage the algorithm can accurately detect a malignancy when “evaluating images of patients with prior occupational asbestos exposure.” R. at 4-5. It is consistent with court policy that Mr. Miller, a reasonably prudent user of Cyber MD, would not have been able to discover the algorithmic flaw because the danger from the defect is not something he could have detected and guarded against.

Therefore, Cyber MD’s algorithmic flaw was un-discoverable by Mr. Miller because he would not have been able to test the algorithm in any way or guard against it and it was in no way an obvious flaw.

For the above reasons, neither of Shawnee’s statutes of repose bars Respondent’s claims. Cyber MD’s repeated evaluations of Mr. Miller constituted a continuous course of treatment under § 12-404, and its latent algorithmic flaw falls within § 12-410’s express exception because of the un-discoverable nature of the defect.

CONCLUSION

This litigation demonstrates that longstanding and established legal doctrines must hold firm when applied to novel technological advances. Innovation may change the means by which healthcare is delivered, but it should not diminish accountability for the manner in which that care is provided.

For the aforementioned reasons, Respondent respectfully requests this Court AFFIRM the judgment of Court of Appeals and hold that genuine issues of material fact remain as to MHS's vicarious liability under the doctrine of apparent agency and that Respondent's claims are not barred by Shawnee's statutes of repose.

Respectfully Submitted,

ATTORNEYS FOR RESPONDENT